

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SEVENTH REGION**

**POLLOCK PLASTERING, INC**

**Employer<sup>1</sup>**

**and**

**CASE 7-RC-22840**

**LOCAL 67, OPERATIVE PLASTERERS' AND  
CEMENT MASONS' INTERNATIONAL  
ASSOCIATION OF THE UNITED STATES  
AND CANADA, AFL-CIO**

**Petitioner**

**and**

**LOCAL 9, INTERNATIONAL UNION OF BRICKLAYERS  
AND ALLIED CRAFTWORKERS, AFL-CIO**

**Intervenor**

**APPEARANCES:**

**Gregory T. Lodge**, Attorney, of Toledo, Ohio, for the Employer  
**Eric Frankie**, Attorney, of Detroit, Michigan, for the Petitioner  
**John Adam**, Attorney, of Royal Oak, Michigan, for the Intervenor

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding<sup>2</sup>, the undersigned finds:

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<sup>1</sup> The name of the Employer appears as set forth in the formal documents that issued in Case 7-RC-22437.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organizations involved claim to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

## **Overview**

The Petitioner seeks to represent a unit of all full-time and regular part-time plasterers employed by the Employer working at or out of its facility, but excluding carpenters, laborers, managers, and guards and supervisors as defined in the Act. The Intervenor concedes that the petition was filed during the window period of an existing contract between it and the Employer entered into in August 2004 and expiring April 30, 2005 (the MCE agreement). However, the Intervenor asserts that the petition is barred by another contract, a Section 8(f) collective bargaining agreement between the Washtenaw Contractors Association, Inc. (WCA) and the Intervenor. That contract is in effect until July 31, 2006. Specifically, the Intervenor asserts that the WCA agreement to which the Employer is bound became a Section 9(a) contract as to the Employer as a result of the Board's August 18, 2003 certification of the Intervenor as the representative of the above-mentioned unit. The Employer and Petitioner contend that this agreement is insufficient to constitute a contract bar.

I find that no contract bar exists for the following reasons: 1) assuming that the Employer is a member of WCA, there is no evidence that it manifested an intent to be bound by the 2003-2006 WCA agreement; 2) assuming that the Employer is not a member of WCA, the signatures on the 2000-2003 WCA agreement, the last agreement signed by the Employer, are inadequate for contract

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<sup>2</sup> The parties filed post-hearing briefs. However, the Employer failed to appear at the hearing. The petition was served by regular mail on the Employer on February 2, 2005. A Notice of Representation Hearing and a Notice Rescheduling Hearing was served on the Employer on February 10 and 15, respectively. On February 23, the day before the hearing, Employer's counsel advised the hearing officer that neither he nor the Employer would attend the hearing.

bar purposes; 3) the WCA agreement applies to a much narrower geographical unit

than the unit certified by the Board; 4) the MCE agreement executed between the Intervenor and the Employer by its terms supersedes all other agreements; and 5) finding that the WCA agreement constitutes a contract bar could have the effect of eliminating any window period for the filing of petitions by bargaining unit employees or other labor organizations and, thus, prevent employees from choosing to remove or change their bargaining representative.

### **The Evidence**

On August 18, 2003, pursuant to a petition filed in Case 7-RC-22437 involving these same parties, the Intervenor was certified as the exclusive collective bargaining representative of employees in the following appropriate unit:

All full-time and regular part-time plasterers employed by the Employer working at or out of its facility located at 991 Secor Road, Temperance, Michigan; but excluding all carpenters, laborers, managers, guards, and supervisors as defined in the Act.

Michigan Council of Employers of Bricklayers & Allied Craftworkers (MCE) is a multi-employer association formed for the purposes of collective bargaining. The Employer is not a member of MCE. MCE and the Intervenor are parties to a Section 9(a) collective bargaining agreement effective from August 1, 2003 through April 30, 2005. After the Intervenor's August 2003 certification, it and the Employer signed the MCE agreement on August 4, 2004. On August 6 and 9, the Employer and Intervenor, respectively, also signed an Addendum to the MCE agreement. This Addendum specifically defined plastering work and set forth the wage rates in various geographic areas, including a catch-all "all other areas." The Addendum does not contain any geographical limits on the unit. The MCE agreement contains a clause, Article XXIV, Section 1, that states:

This Agreement constitutes the entire agreement between the parties. The provisions of any local or area collective bargaining agreement within the jurisdiction of Local 9 which may be in conflict with the provision contained in this Agreement, shall be subordinate to the provisions of this Agreement.

WCA is a multi-employer association formed for the purposes of collective bargaining. WCA and the Intervenor were parties to a Section 8(f) agreement

effective from August 1, 2000 through July 31, 2003. This Section 8(f) agreement covered construction work performed only in a small area of Michigan,

specifically Washtenaw County and eight townships in Livingston County. On July 29, 2002, the Employer and Intervenor signed an Addendum to the 2000-2003 WCA agreement. However, the Addendum stated that in order to become signatory to the Addendum, the Employer shall first become signatory to the 2000-2003 WCA agreement. The record contains no evidence that the Employer signed the 2000-2003 WCA agreement.

WCA and the Intervenor are parties to a settlement agreement signed in September 2003. This agreement sets forth the changes to the 2000-2003 WCA agreement. It indicates that the new agreement is effective from August 1, 2003 until July 31, 2006. The new agreement has not yet been typed in booklet form.

In the Decision and Direction of Election in Case 7-RC-22437, it was noted that the record indicated the Employer was a member of WCA. At the hearing in this case, the Intervenor failed to present documentary evidence that the Employer had been or is presently a member of WCA. The Intervenor's witness testified that he was not certain if the Employer was currently a member of WCA or had delegated authority to WCA to negotiate collective bargaining agreements on the Employer's behalf.

## **Analysis**

The Intervenor contends that the WCA agreements are a bar to the instant petition. While recognizing that those agreements are Section 8(f) contracts, it argues that, as to the Employer, the agreements converted to Section 9(a) contracts upon the Intervenor's certification in August 2003. I find that the WCA agreements are not a bar to this petition for a number of reasons.

### **WCA Agreements**

The record is not clear as to whether the Employer is a member of the WCA; however, it does not matter. None of the WCA agreements are a bar whether the Employer is or is not a WCA member.

Assuming that the Employer was and is a member of WCA, the Intervenor did not introduce any evidence that the Employer manifested an intent to be bound by the 8(f) 2003-2006 WCA agreement. The 2000-2003 WCA agreement expired prior to the Intervenor's Section 9(a) certification. The Board has held that mere inaction will not bind an 8(f) employer to a successor contract reached through

multi-employer negotiations. *James Luterbach Construction Co., Inc.*, 315 NLRB 976, 979 (1994). Rather, the Board first examines whether the employer

was a part of the multi-employer unit prior to the dispute giving rise to the case. If the first question is answered affirmatively, then the Board examines whether the employer has distinctly recommitted itself to the union that it will be bound by the upcoming or current multi-employer negotiations. *Id.* at 979-980 Assuming that the first inquiry is satisfied, the Intervenor failed to present any evidence that the Employer affirmatively recommitted to the union that it would be bound by multi-employer negotiations for the 2003-2006 WCA agreement. Therefore, I find that, if the Employer is a WCA member, the WCA agreement is not binding as to the Employer, and accordingly does not constitute a contract bar.

Assuming that the Employer is not a member of WCA, the only contract that can be a bar to the petition is the 2000-2003 WCA agreement by way of the Addendum to that contract signed by the Employer in July 2002. In order for a contract to bar an election, all parties must have signed the contract. *Appalachian Shale Products Co.*, 121 NLRB 1160, 1161 (1958). The only agreement in the record that was signed by the Employer is the July 29, 2002 addendum to the 2000-2003 WCA agreement. However, as noted, the addendum states that in order to become signatory to the Addendum, the Employer shall first become signatory to the current WCA Master Agreement. Since the Employer's signature is missing from the 2000-2003 WCA agreement, its signature on the Addendum is ineffective and nonbinding. Thus, the Employer is not signatory to the 2000-2003 WCA contract. As a result, the rollover provisions of that contract and Addendum that would have allowed them to continue in effect on a year-to-year basis are not effective. Thus, they are not a bar.

The Intervenor's assertion that the WCA agreements bar the petition also fails because the 8(f) WCA agreements apply only to a small geographical area. The Section 9(a) certified unit does not contain any geographical limitations. After obtaining its certification, the Intervenor negotiated a 9(a) collective bargaining agreement with the Employer, the MCE agreement and Addendum. The Addendum also contains no geographical limits on the unit. Yet, the Intervenor argues that the WCA agreement, with its narrow geographic coverage, should bar the petition. Even assuming that the WCA agreements otherwise could serve as a bar, the geographic limitations placed on the unit prevents a finding of contract bar. See e.g., *Central Truck Lines*, 98 NLRB 374, 375 (1952) (contracts that depart substantially from a certified unit are not a bar to an election); See also, *Alley Drywall, Inc.*, 333 NLRB 1005, 1007, (2001) (Board rejected the use of 8(f) bargaining history to limit the geographical coverage of a petitioned-for unit.)

## **Paramount Status of MCE Agreement**

The MCE agreement supersedes the WCA agreements by its terms. It was negotiated after both the Intervenor's certification and WCA agreements, and states that it contains the entire agreement between the Employer and the Intervenor. The MCE agreement also states that any other bargaining agreement within the jurisdiction of the Intervenor is subordinate to the provisions of the MCE agreement. The Intervenor negotiated this agreement, and that provision, with full knowledge of the WCA agreement to which it is a party. Therefore, the WCA agreements were effectively superseded by the execution of the MCE agreement and are not a bar to an election.<sup>3</sup>

## **Perpetual Contract Bar**

Finally, if the WCA agreements were permitted to serve as a contract bar, bargaining unit employees likely would be perpetually prohibited from exercising their right to remove or seek a change in their bargaining representative. The MCE and WCA agreements have different expiration dates. If the WCA agreements are found to be a bar now, when the window period under the current WCA agreement comes into effect in 2006, the successor agreement to the soon-to-expire 9(a) 2003-2005 MCE agreement will then serve as a bar to any petition filed. Under this scenario, if both the WCA and MCE agreements could serve as contract bars, the window period for filing representation petitions could conceivably forever be closed. The Board has long held that parties cannot create a continuing and possibly permanent bar to the filing of petitions. See e.g., *Pacific Coast Assn of Pulp & Paper Mfrs.*, 121 NLRB 990, 993 (1958) (a contract that has no fixed duration is not a bar for any period)

Thus, for all the reasons set forth, I find that no contract bar exists.

5. Based on the foregoing and the record as a whole, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time plasterers employed by the Employer working at or out of its facility located at 991 Secor Road, Temperance, Michigan; but excluding all carpenters, laborers,

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<sup>3</sup> The Intervenor's witness testified that the MCE and WCA agreements provided for the same wages and fringe benefits and that there are only small language differences between the two contracts. The wages and fringe benefits are not the same and there are other differences between the contracts.

managers, and guards and supervisors as defined in the Act.<sup>4</sup>

Those eligible to vote shall vote as set forth in the attached Direction of Election.<sup>5</sup>

Dated at Detroit, Michigan, this 11<sup>th</sup> day of March 2005.

(SEAL)

"/s/ [Stephen M. Glasser]."

/s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director

National Labor Relations Board

Region Seven

Patrick V. McNamara Federal Building

477 Michigan Avenue - Room 300

Detroit, Michigan 48226

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<sup>4</sup> The unit is as set forth in the Certification of Representative that issued in Case 7-RC-22437.

<sup>5</sup> Absent a stipulation not to use the construction industry eligibility formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961) as modified in 167 NLRB 1078 (1967) and *Steiny & Co.*, 308 NLRB 1323 (1992), the formula applies to all construction industry elections. *Signet Testing Laboratories*, 330 NLRB 1 (1999), citing *Steiny & Co.* There was no such stipulation. Thus, the *Daniels/Steiny* eligibility formula will apply, as noted in the attached Direction of Election. There was no discussion of the use of a manual or mail ballot election. This is an administrative matter and will be determined at the time election arrangements are made.

## **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted under the direction and supervision of this office among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees who have been employed for 30 working days or more within the 12 months preceding the eligibility date or if they have had some employment in those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. Ineligible are those employees who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who quit or are discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike, who have quit or been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

**LOCAL 67, OPERATIVE PLASTERERS' AND CEMENT MASONS'  
INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND  
CANADA, AFL-CIO**

**or**

**LOCAL 9, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED  
CRAFTWORKERS, AFL-CIO**

**or**

**NO UNION**

## LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision **3** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile or E-mail transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **March 18, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570**. This request must be received by the Board in Washington by, **March 25, 2005**.

## POSTING OF ELECTION NOTICES

a. Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays.

c. A party shall be stopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. \*/

**d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).**

\*/ Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.